82-5590

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

ERNEST LEE MILLER,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

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QUESTIONS PRESENTED

1. Whether, consistent with the Sixth, Eighth and Fourteenth Amendments, a defendant in a capital case may be denied access to grand jury testimony of the State's two principal witnesses, who have made prior exculpatory and inconsistent statements, and whose trial testimony will provide the basis for both the determination of guilt and the requested sentence of death?

2. Whether the court below erred in believing that the U.S. Constitution requires that a defendant whose jury has recommended life imprisonment be sentenced to death in order to achieve "consistency" with a co-defendant's death sentence?

3. Whether exclusion of evidence of a defendant's "rehabilitative capacity" may be viewed as harmless error in light of the Eighth and Fourteenth Amendments where the judge, notwithstanding a jury recommendation of life, has sentenced the defendant to death?

4. Whether, consistent with the Eighth and Fourteenth Amendments, a sentencing judge may override a jury's recommendation of life imprisonment in a capital case -- at least where a statutory mitigating circumstance has been established?

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The opinion and judgment of the Supreme Court of Florida is reported as Miller v. State, 415 So.2d 1262 (Fla. 1982), and appears in the Appendix ("App.") at 1a. The trial court in Florida did not issue a formal opinion. The judgment of the trial court, its order denying petitioner access to certain grand jury transcripts, a transcript of the trial court's sentencing determination and the trial court's Findings in Support of Sentences are reproduced. App. at 5a et seq.

JURISDICTION OF THE COURT

The Supreme Court of Florida issued its opinion and judgment in this case on March 25, 1982. App. at 1a. On July 22, 1982, the Supreme Court of Florida by written order denied petitioner's timely motion for rehearing. App. at 4a. Petitioner filed a timely application, on September 8, 1982, for an extension of time in which to file a petition for writ of certiorari, and Justice Powell on September 9, 1982, ordered that the time for filing this petition be extended to and including October 20, 1982. Ernest Lee Miller v. Florida, No. A-256 (Sept. 9, 1982).

The jurisdiction of this Court is conferred by 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ; to be confronted by the witnesses against him; to have compulsory process for obtaining witnesses in his favor . . . .

The Eighth Amendment to the United States Constitution provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The Fourteenth Amendment to the United States Constitution provides in pertinent part that no State shall:

> deprive any person of life, liberty, or property, without due process of law . . . .

Florida Statutes § 905.27(1) concerning access to grand jury testimony; § 90.801(2)(a) concerning the evidentiary effect of prior sworn statements; and § 921.141 setting forth Florida's death sentencing criteria and procedures are reproduced in the Appendix to this petition. App. at 28a et seq.

STATEMENT OF THE CASE

Petitioner Ernest Lee Miller was convicted on November 15, 1979, of first degree murder of an unidentified victim referred to in the indictment only as "Tammy." Following a separate sentencing hearing, the jury that had convicted petitioner recommended a sentence of life imprisonment. Petitioner's co-defendant and older half-brother, William Riley Jent, was separately tried and then convicted of first degree murder. Jent, however, received a jury recommendation of death. In a combined sentencing order, the judge who had presided at both trials sentenced petitioner and his co-defendant to death.[1/] In overriding the jury recommendation of life imprisonment for petitioner, the trial judge relied on the heinous nature of the crime and a perceived constitutional need to avoid disparate sentences between co-defendants.

The Trial

The State's case on guilt -- and on the requested death penalty -- centered on the testimony of two women, Glinna Frye and Carlena Jo Hubbard, who said they participated in events leading to the crime. If the testimony of these two women is to be credited, sometime on the night of July 12, 1979, a woman known only as "Tammy" was beaten, transported to the Richloam Game Preserve, doused with gasoline and burned by petitioner and his co-defendant Jent

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1/ Jent's conviction and sentence were upheld on appeal. Jent v. State, 408 So.2d 1024 (Fla. 1981), cert. denied on other issues, 102 S. Ct. 2916 (1982).

while a group of approximately seven people -- the State's two principal witnesses among them -- stood by and watched.

Prior to trial, petitioner moved to compel production of the grand jury testimony of both witnesses, as well as of a third person who did not ultimately testify. (R. at 215-17).[2/] In support of the motion, petitioner noted that the individuals were alleged eyewitnesses and cited deposition testimony that the two women had told significantly different versions of the events -- including statements that they had not witnessed any killing. He also cited the State's promises of leniency in exchange for their testimony. In response, the State said petitioner was on a "fishing expedition" and cited the general need for secrecy of grand jury proceedings. (R. 2132-34). The trial judge denied the motion to produce and, despite petitioner's request that he do so, also refused to review in camera the transcripts of the grand jury testimony. (R. at 2138). The only reason given for the denial was that a proper "predicate" (showing of need) had not been made. App. at 5a. Petitioner thus did not have the benefit of the transcripts at either the trial or the sentencing hearing.

At trial, Frye admitted that, on two different occasions during the day of July 12, 1979, she had injected into her veins a hallucinogenic drug known as "Crystal T." (R. at 1343-44, 1346). Similarly, Hubbard testified that on the night of July 12, 1979, she had been "pretty totaled" as the result of heavy alcohol consumption. (R. at 1207). Both women admitted as well to having told police authorities several different versions of what had happened on the night of July 12, 1979. Frye testified that she initially told police

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2/ Citations to "R." are to the record on appeal to the Supreme Court of Florida.

authorities that there was no killing. (R. at 690). After she was arrested, she told police authorities that she did not see or know anything. (R. at 699). In exchange for her testimony at trial, the State agreed to drop the charge of accessory after the fact to murder in the first degree that had been lodged against her. (R. at 1340). On the eve of trial, Frye informed the State's attorney for the first time of her latest version of the events occurring on the night of July 12. In a proffer by the State, she claimed to have witnessed petitioner, the co-defendant Jent, and two other men rape the victim at petitioner's house prior to the burning at the game preserve. Because this information was wholly inconsistent with Frye's prior statements and, therefore, came as a surprise to petitioner, Frye's testimony concerning the alleged rape was excluded from the guilt phase of the trial. (R. at 1302).[3/]

When the second witness, Hubbard, first talked to police authorities, she denied knowledge of the events. (R. at 1207-08). Hubbard later told authorities that a group had been partying on the river, but that petitioner did not kill anyone. (R. at 1208). Only after the police threatened to charge her with murder or accessory, did Hubbard agree to testify against petitioner. (R. at 1209-10). Hubbard did not testify, however, that a rape had occurred. To the contrary, she stated that the group stopped at petitioner's house for only a few seconds prior to going to the game preserve. (R. at 1188, 1199).

The State did not offer any evidence of fingerprints, tire tracks, fingernail scrapings, or hair samples linking petitioner to the crime, although petitioner's fingerprints

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3/ At the sentencing stage of the trial, Frye was allowed to testify regarding the alleged rape. (R. at 1551-52).

were taken; tire tracks found at the site of the body were photographed (R. at 1077-78); scrapings were taken from underneath the victim's fingernails (R. at 1135); and hair samples were taken from petitioner (R. at 135). Nor did the State offer any evidence directed to the identity of the victim, although the victim's fingerprints were taken. (R. at 1116). The defense rested after the close of the State's case in chief without putting on any evidence. (R. at 723). The jury returned a verdict of guilty of murder in the first degree. (R. at 356).

In a motion for new trial filed prior to sentencing by the trial court, petitioner urged the existence of newly discovered evidence. (R. at 425-26). In support of the motion, petitioner filed the affidavits of two people, Elmer Carroll and Tina Marvin, who claimed to know the identity of the victim "Tammy" and the identity of her murderer. (R. at 524-27). According to these affidavits, "Tammy" was in fact a woman named Gail Bradshaw and her murderer was her boyfriend of four years, Boddy Dodd. Carroll stated in his affidavit that he witnessed Dodd beat and burn Gail Bradshaw at the Richloam Game Preserve on the night of July 12, 1979. (R. at 526-27). Tina Marvin, Carroll's girlfriend, stated in her affidavit that Carroll told her about the murder he had witnessed. (R. at 525).

At an evidentiary hearing on the motion, Gail Bradshaw's brother testified that the burned victim shown in a photo looked like his sister. (R. at 1837). Gail Bradshaw's sister testified that several pieces of jewelry found on the body of the victim were just like her sister's jewelry. (R. at 1853-54). Carroll and Marvin recanted that part of their

affidavits detailing the murder of Gail Bradshaw,[4] but testified that they had last seen Gail sometime around July 12, 1979 (R. at 1864, 1876-77, 1933); that they left town almost immediately after they heard of the discovery of the burned body (R. at 1863, 1940); and that they had on several occasions heard Bobby Dodd threaten to kill Gail Bradshaw (R. at 1879, 1932). The trial judge denied the motion for new trial. (R. at 545-46).

The Sentencing Proceedings

At the separate sentencing hearing before the jury on November 16, 1979, on the issue of the penalty to be imposed, defense counsel presented mitigating evidence that petitioner was 23 years old (R. at 1573); that he was married and had two children (R. at 1573); that he had no prior criminal record (R. at 1573); and that he had used drugs on the night of July 12, 1979 (R. at 1318, 1599). In addition, he presented the testimony of a clinical psychologist, Dr. Sidney Merin, regarding significant aspects of petitioner's psychological makeup. In particular, Dr. Merin testified:

> Mr. Miller is basically a dependent personality. He continuingly and unfavorably judges himself in relation to stronger people around him. If that stronger person is a favorable, community oriented individual, he'll take over those characteristics. If those

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4/ Elmer Carroll gave as his explanation for the statements in his affidavit petitioner's promise, made while the two were incarcerated together, to protect Tina and to supply Elmer with reefers. (R. at 1889-91). However, Carroll admitted on the stand that, while in police custody immediately prior to the hearing, he was told that if he did not change his story he could be charged with perjury, murder, or accessory to murder. (R. at 1914-15). Tina Marvin testified that she signed the affidavit to help out (R. at 1952), but also admitted that she was afraid that if she told her story about Gail she would get in trouble and lose her baby. (R. at 1964).

> stronger persons are unfavorable and destructive, he will take on those characteristics. He is basically not certain of how much of a man he is and he can be thought of in some respects as being kind of a chameleon, he'll take on the shading and coloration of whatever happens to be around him. We might even say that he is a shadow of an individual who is looking around for some object to attach the shadow to.

(R. at 1590-91). Dr. Merin concluded that, separate and apart from other individuals, Mr. Miller does not have a violent nature. (R. at 1591). However, due to petitioner's weak and inadequately developed ego, he acts under the domination of stronger persons. (R. at 1590). Dr. Merin also testified that drug use could further diminish petitioner's decision-making power. (R. at 1597).

In addition to the testimony regarding petitioner's psychological tendencies, defense counsel attempted to present in mitigation Dr. Merin's testimony regarding petitioner's rehabilitative capacity. However, the trial court refused to allow the testimony, finding that rehabilitative capacity did not fall within any of the express mitigating circumstances set forth in the Florida death penalty statute. (R. at 1545-46, 1567-68).

Based on the mitigating evidence the trial court did allow, defense counsel urged the applicability of four of the mitigating factors under Florida's death penalty statute, Fla. Stat. Ann. § 921.141(6) (R. at 1623-25). The jury returned a recommendation that petitioner be sentenced to life imprisonment. Under Florida law, the jury was not required to make written findings of what aggravating and mitigating circumstances it found to exist. However, the jury did specifically report that it had reached its recommendation after deliberating and weighing the mitigating and

aggravating circumstances under the Florida sentencing statute. (R. at 1643).

In a joint sentencing proceeding two months later, the trial judge sentenced both the petitioner and the co-defendant Jent to death, thereby overriding petitioner's jury recommendation of life imprisonment. App. at 22a-24a. The trial judge found as aggravating circumstances that the murder was especially heinous, atrocious, or cruel, and that the murder was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification. App. at 11a-12a, 20a-21a. However, the court concluded that, because of the overlap between these two aggravating circumstances, it would consider them as one aggravating circumstance. Id.

The only mitigating circumstance that the court found to apply to petitioner was the absence of any significant history of prior criminal activity. While recognizing that the jury may have been "emotionally impressed" by Dr. Merin's pyschological testimony, the court rejected the testimony of Dr. Merin as contrary to the evidence that petitioner's participation in the crime was equal to that of his older half-brother, Jent. Compare App. at 13a with 21a-22a. Focusing on its finding that the co-defendants participated equally in the crime, the court concluded:

> The United States Supreme Court has determined that if the death penalty is to be imposed by the states, the United States Constitution demands that it be imposed with regularity, rationality and consistency. [citations to Proffitt and Furman]
>
> The jury for the defendant Jent has recommended death and this court finds that the weight of the aggravating and mitigating circumstances demand death sentences for both defendants.

> Therefore, if the recommendation of the jury for the defendant Miller were followed, that would result in two co-perpetrators who participated equally in a crime having disparate sentences. It would cause a hollow ring in the Florida halls of justice if the sentences in these cases were not to be equalized.

App. at 24a. In light of the court's perceived need for consistency in the imposition of the death penalty where there is no substantive difference in the participation -- as opposed to the character -- of each co-defendant, the court overrode the jury recommendation of life and sentenced the petitioner to death.

The Appeal

On direct appeal to the Supreme Court of Florida, petitioner urged that the trial court's denial of his request for the grand jury testimony of the State's two eyewitnesses violated his Fifth, Sixth, and Fourteenth Amendment rights. (Appellate Brief at 8-10). Petitioner also claimed that his sentence to death was unconstitutional. Petitioner alleged that the trial court, contrary to this Court's decision in Lockett v. Ohio, 438 U.S. 586 (1978), unconstitutionally restricted the mitigating factors that could be considered by the jury when it refused to allow the psychologist to testify at the sentencing hearing regarding petitioner's rehabilitative capacity. (Appellate Brief at 39-41). Petitioner also claimed that the trial court erred in relying on evidence presented in Jent's trial in sentencing petitioner to death. (Appellate Brief at 48). In addition, petitioner claimed that the trial court wrongly overrode the jury recommendation of life by its failure to consider the mitigating circumstances that the

jury must have found to have existed in recommending life over death. (Appellate Brief at 47-49).

The Supreme Court of Florida rejected petitioner's contentions in their entirety and affirmed his conviction and sentence of death. Miller v. State, 415 So.2d 1262 (Fla. 1982); App. at 1a. Regarding the trial court's refusal to allow the psychologist to testify as to petitioner's rehabilitative capacity, the Supreme Court found no reversible error, since "[t]he effectiveness of the psychologist's testimony, even without the complained-of omission, is evidenced by the jury's recommendation of life imprisonment." 415 So.2d at 1263; App. at 2a. The Supreme Court failed to acknowledge, however, that petitioner was ultimately sentenced to death by the trial judge, who neither heard nor considered the mitigating evidence regarding rehabilitative capacity.

Regarding the sentence itself, the Florida Supreme Court approved the trial court's override of the jury's recommendation of life so as to achieve consistency with the co-defendant's death sentence:

> In his sentencing order the trial court found no substantive difference between Miller and Jent in their participation in the crime. Notwithstanding the jury's recommendation, he found that Miller clearly deserved the death penalty. Mindful of the constitutional demand that the death penalty must be imposed in a regular, rational, consistent manner, the court also found that following the recommendation of Miller's jury would result in an unwarranted disparity in sentences.

Id. at 1263; App. at 2a.

Two justices dissented. In noting the differences in the evidence for the co-defendants that would support disparate sentences, the dissent stated:

> By its recommendation, the jury obviously considered [the psychologist's] testimony and found Miller deserving of some mitigation of sentence. The defense presented no such evidence at Jent's sentencing proceeding, and I find that the evidence presented in the two sentencing proceedings justified the respective jury recommendations.
>
> It appears to me that the trial judge felt that the circumstances of this homicide were so egregious that they overwhelmed any other consideration. Still, there was but one real aggravating circumstance (cruel, atrocious and heinous) and one admitted mitigating factor (no prior criminal record). The evidence is also susceptible of a finding that this defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

Id. at 1264, App. at 3a.

The Supreme Court of Florida denied Mr. Miller's petition for rehearing.

REASONS FOR GRANTING THE WRIT

I. THE REFUSAL OF STATE COURTS IN CAPITAL CASES TO PROVIDE GRAND JURY TESTIMONY OF PROSECUTION WITNESSES WHO HAVE GIVEN EXCULPATORY AND INCONSISTENT STATEMENTS -- AND WHOSE TESTIMONY FORMS THE BASIS FOR THE DETERMINATION OF GUILT AND SENTENCE OF DEATH -- PRESENTS AN IMPORTANT FEDERAL QUESTION

In any federal criminal trial, a defendant is entitled to transcripts of the grand jury testimony of government witnesses. The right was recognized in Dennis v. United States, 384 U.S. 855 (1966), and subsequently codified by amendment to the Jencks Act. 18 U.S.C. § 3500(e)(3). Although this Court has not required, as a matter of constitutional right, that defendants be afforded grand jury transcripts in criminal proceedings, its decision in United States v. Augenblick, 393 U.S. 348, 356 (1969), suggested that, in a proper case, the failure to produce a prior statement of a prosecution witness in a state criminal proceeding may violate the Sixth Amendment. The Court has not addressed the issue since Augenblick and has never addressed the issue in the context of a defendant charged with a capital offense. Cf. Brady v. Maryland, 373 U.S. 83 (1963) (holding that a state has the constitutional duty, under the due process clause, to disclose material evidence favorable to an accused). Nor has the Court addressed the Eighth Amendment aspects of withholding grand jury testimony that bears on evidence forming the basis of a death sentence.

1. Petitioner, charged with first degree murder, based his defense upon the lack of credibility of Glinna Frye and C.J. Hubbard, the two eyewitnesses against him. Their testimony was central to the State's case and demand

for the death penalty, but both had made unsworn and inconsistent statements to the police, including an exculpatory statement that they had not witnessed any killing. (R. at 690, 693-94, 699-700, 1207-10, 1553). Both had reason to fear that they could be prosecuted for their own roles. (R. 693-94, 1208).[5/] They appeared before the grand jury under oath at a time when the events in question were fresh in memory.

Prior to trial, petitioner's counsel moved for production of transcripts of the grand jury testimony of the State's two central witnesses (Frye and Hubbard), as well as of a third person who did not testify at trial. (R. at 215-17). The motion recited deposition testimony showing that the two witnesses in question had previously given different versions of the events, and that one had acknowledged receiving promises of leniency from the State in return for her testimony in this case. (R. at 216). The motion also recited the necessity of the transcripts to assure rights of due process and effective confrontation of witnesses under the United States Constitution. (R. at 217).[6/]

In response, the State claimed that the defense was on a "fishing expedition" and cited the generalized interest in grand jury secrecy. (R. at 2132-35). During argument on the motion, petitioner's counsel requested that

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5/ Frye at one point was arrested as an accessory after the fact, while Hubbard was in protective custody when she first told the story she recounted at trial.

6/ Moreover, grand jury testimony in Florida differs from other witness statements. Like Federal Rule Evidence of 801(d)(1) on which it is modeled, the Florida statute exempts prior sworn statements from the hearsay rule. Fla. Stat. Ann. § 90.801(2)(a). Thus, prior grand jury testimony can be considered by the jury for the truth of the matter asserted.

the trial court at least review the transcripts in camera before denying the motion. (R. at 2130-32). The court denied the motion saying only that "a sufficient predicate" (showing of need) had not been made. (R. at 2138); App. at 6a.

Ultimately, the State's case on both guilt and sentencing derived from the testimony of the two witnesses concerned. Indeed, the aggravating factor on which the trial court based petitioner's sentence of death under Florida's death penalty statute (heinous crime) was supported solely by testimony from the two witnesses in question.

The Florida Supreme Court summarily affirmed the decision to withhold the grand jury transcript, based on its reasoning in an appeal by petitioner's co-defendant. Miller, 415 So.2d at 1263 & n.3 (citing Jent v. State, 408 So. 2d 1024 (Fla. 1981), cert. denied on other issues, 102 S. Ct. 2916 (1982)). In Jent, the Florida court ruled (a) that the defendant had failed to lay a "a proper predicate" for the testimony based on something other than surmise about the testimony's contents, and (b) that the defense's subsequent attack on the credibility of the state's witnesses by cross-examination "obviated that need for their prior [grand jury] testimony." Jent, 408 So.2d at 1027-28.

The ruling below places a defendant in a capital case in an untenable position: in order to persuade the judge to produce the grand jury transcripts, the defendant effectively must demonstrate some inconsistency between a witness' other statements and grand jury testimony -- but the defendant cannot possibly do so because the grand jury testimony is secret. This obstacle has rarely been

surmounted in Florida, particularly in capital cases.[7/] Florida's requirement of showing an actual conflict between current statements and grand jury testimony as a "predicate" for access to a grand jury transcript thus effectively denies defendants any reasonable hope of obtaining potentially relevant and material evidence in their defense. See Jencks v. United States, 353 U.S. 657, 666-68 (1957).

2. There is a conflict among the states as to whether a defendant in petitioner's position could have obtained comparable grand jury testimony in these circumstances. Twenty states afford a broad right to such testimony; seven deny access in most instances; in fourteen others (including Florida), some particular need or other showing must be made; and, as for the others, we have not ascertained a controlling decision or statute. See App. at

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7/ A review of the decisions listed in the annotation to Fla. Stat. Ann. § 905.27 shows that Florida appellate courts have not reversed a trial court's denial of access to grand jury testimony in a capital murder case in at least 40 years. The Florida Supreme Court last set aside a refusal of defense access to a grand jury transcript in any criminal case 24 years ago. Gordon v. State, 104 So.2d 524, 536-37 (Fla. 1958). Conversely, the last appellate affirmance of a Florida trial court order for in camera judicial inspection of a grand jury transcript occurred in 1969. State v. Drayton, 226 So.2d 469 (Fla. App. 1969).

During the past quarter-century, Florida appellate courts have denied defendants access to grand jury transcripts more than 15 times, including 7 first degree murder cases. In addition to petitioner's case, the decisions involving first degree murder charges include Jent v. State, 408 So.2d at 1027-28; Domeq v. State, 336 So.2d 405 (Fla. App. 1976) (per curiam); State v. McArthur, 296 So.2d 97 (Fla. App. 1974); Williams (Charles) v. State, 275 So.2d 284 (Fla. App. 1973) (per curiam); Williams (Katherine) v. State, 271 So.2d 810 (Fla. App. 1973) (per curiam); State v. Gillespie, 227 So.2d 550 (Fla. App. 1969). Notably, in McArthur, the trial court dismissed the indictment because the grand jury testimony had not been recorded, while the appellate court held that such testimony need not be recorded. Gillespie held that the trial court abused its discretion in ordering an in camera inspection of grand jury transcripts in response to a general request for evidence containing expulpatory or impeachment statements.

32a. Since, as noted below, the access to such testimony can affect the basis on which a death penalty is imposed, this conflict bearing on fundamental Eighth Amendment rights should be resolved.

3. While the Constitution may not guarantee an ordinary criminal defendant access to grand jury transcripts of his chief accusers, this Court has recognized that different considerations apply where the ultimate penalty of death might be imposed -- and where the Eighth Amendment therefore comes into play. While reviewing courts usually may not examine the severity of the sentence imposed by a trial court, Rummel v. Estelle, 445 U.S. 263, 274-75 (1980), this Court has closely scrutinized both statutory sentencing schemes and individual sentencing proceedings in death penalty cases. See Eddings v. Oklahoma, 102 S. Ct. 869 (1982). This close scrutiny reflects the unique nature of capital punishment which creates a correspondingly unique need for reliability in the determination that death is the appropriate penalty in a particular case. Lockett v. Ohio, 438 U.S. 586, 604-05 (1978) (plurality opinion of the Chief Justice); Woodson v. North Carolina, 428 U.S. 280, 304 (1976) (plurality opinion of Justice Stewart).

These Eighth Amendment considerations apply to the determination of guilt or innocence of a defendant charged with a capital offense -- and certainly to the proof of any aggravating factor on which the subsequent death sentence is based. Cf. Gardner v. Florida, 430 U.S. 349, 359 (1977) (holding that the trial court may not refuse to withhold a presentence report that provides a partial basis for imposing the death penalty). In Eddings v. Oklahoma, this Court stated:

> Just as the state may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer, refuse to consider, as a matter of law, any relevant mitigating evidence.

102 S. Ct. at 875-76. In this case, the trial court has prevented a defendant from presenting to the sentencer (jury and sentencing judge) evidence potentially relevant to the other side of the sentencing equation -- the aggravating factors relied on by the State. By erecting a nearly insurmountable barrier between grand jury transcripts and defendants facing a death penalty, the Florida courts have precluded such defendants from making one type of challenge to the evidence asserted in support of death.

4. Sixth Amendment issues are raised by the decision below as well. See Palermo v. United States, 360 U.S. 343, 362-63 (1959) (Brennan, J., concurring)[8/] The only reason the state offered for opposing petitioner's request for access to the grand jury transcript was its generalized interest in grand jury secrecy. By contrast, the defendant in a capital case has the most compelling interest imaginable in testing the credibility of the witnesses against him -- his life. This Court previously has held that a state's generalized interest in the secrecy of juvenile court records does not outweigh a burglary defendant's Sixth Amendment right fully to test the credibility of the chief prosecution witness. Davis v. Alaska, 415 U.S. 308 (1974). The Constitution cannot afford less protection to a defendant in a capital case, where the stakes are so much higher.

8/ Fifth Amendment issues would be raised if the grand jury transcripts in fact contained exculpatory material. Brady v. Maryland, supra. The two witnesses here had made prior exculpatory statements.

Two cases to be heard this Term will decide whether, and under what circumstances, the Internal Revenue Service may obtain grand jury materials for use in civil tax investigations. United States v. Baggot, 102 S. Ct. 2955 (1982); United States v. Sells Engineering, Inc., 102 S. Ct. 2034 (1982). In both cases, the government has asserted an absolute right to use these materials. It would be tragically incongruous for the government to be allowed unlimited access to grand jury testimony in tax cases while a state criminal defendant was put to death after being denied the same type of testimony.

5. The present case raises the Eighth and Sixth Amendment issues in a narrow context. The evidence on which petitioner's death sentence was based -- as well as the evidence linking him to the underlying crime -- were derived from the two eyewitnesses whose grand jury testimony was sought. Both witnesses had admitted to giving exculpatory and inconsistent statements concerning the events. Both had been promised leniency in exchange for their testimony.[9/] In order to make clear that access to grand jury testimony should be afforded when a defendant faces a possible death sentence based on this type of evidence, the petition for certiorari should be granted.

9/ A "particular need" for the testimony was thus clearly made. Compare Dennis v. United States, 384 U.S. at 868-74, with United States v. Youngblood, 379 F.2d 365, 369-70 (2d Cir. 1967).

II. THIS COURT'S DEATH PENALTY DECISIONS WERE WRONGLY CONSTRUED AS REQUIRING EQUALIZED DEATH SENTENCES FOR CO-PARTICIPANTS IN A MURDER -- NOTWITHSTANDING THE INDIVIDUAL DIFFERENCES OF PETITIONER OR THE RECOMMENDATION OF LIFE BY HIS JURY

1. Petitioner's death sentence was predicated on a factor not mentioned in Florida's death penalty statute -- a perceived constitutional requirement from this Court's decisions that petitioner's sentence should be "consistent" with the death sentence of a co-participant in the same crime. The co-participant (petitioner's older half-brother) had received an advisory sentence of death from his jury, while petitioner's jury had recommended life. Under the Florida statute approved in Proffitt v. Florida, 428 U.S. 242 (1976), cf. Gardner v. Florida, 430 U.S. 349, 354 (1977), both the advisory jury and the sentencing judge were to consider certain "aggravating" and "mitigating" factors. The judge found that one aggravating factor (heinous crime) and one mitigating factor (no prior arrests or convictions) were established in petitioner's case. He also noted that the jury had apparently relied on other mitigating evidence.[10/] Yet, there was another factor which helped form the judge's sentence. Citing Proffitt and Furman v. Georgia, 408 U.S. 238 (1972), the trial court reasoned that since the death penalty had to be consistently applied, petitioner's sentence should be equalized with the death sentence of the co-participant in the murder: "[I]f the recommendation of the jury for . . . Miller were followed, that would result in two co-perpetrators who participated equally in a crime having disparate sentences." App.

10/ Both the judge and the two dissenting justices on the Florida Supreme Court cited psychological testimony that petitioner was a "social follower," had a weak ego, and was whatever his environment happened to be around him. App. at 3a, 13a and 21a.

at 24a. As the Florida Supreme Court opinion indicates, the need to equalize the two defendants' treatment affected the trial court's ultimate result:

> In his sentencing order the trial court found no substantive difference between Miller and Jent in their participation in the crime . . . . Mindful of the constitutional demand that the death penalty must be imposed in a regular, rational consistent manner, the Court also found that following the recommendation of Miller's jury would result in unwarranted disparity in sentences. He therefore sentenced both defendants to death, finding that the mitigating evidence did not outweigh the evidence proved in aggravation.

App. at 2a-3a.

This perceived constitutional "demand" to avoid a disparity in the two sentences was thus a crucial non-statutory "factor" in the sentencing calculus. The decision below profoundly misinterprets the "consistency" requirements of Furman v. Georgia, 408 U.S. 238 (1972), and Gregg v. Georgia, 428 U.S. 153 (1976), and essentially disregards the requirement that full consideration be given to the individual characteristics of each defendant under Lockett v. Ohio, 438 U.S. 586 (1978). This issue as applied to co-defendants has not been addressed previously by the Court.

2. The Court has never stated that "consistency" itself is an overbrooding factor that is to be independently applied in capital sentencing proceedings -- beyond the specific factors in the relevant state statute. To date, the concept of overall consistency has been used only as a measuring rod. In this regard, the relevant question has been whether a state's sentencing procedures and criteria result in the death penalty being imposed in a capricious or freakish manner. See Gregg, 428 U.S. at 188-89 (plurality opinion.) To satisfy the general requirement of consistency,

the sentencing statute need only specify objective criteria that provide adequate guidance to the sentencing authority:

> In summary, the concerns expressed in Furman that the penalty of death not be imposed in an arbitrary or capricious manner can be met by a carefully drafted statute that insures that the sentencing authority is given adequate information and guidance.

Id. at 195.

Moreover, nothing in Furman or Gregg suggested that the concept of "consistency" required the adjustment of a life sentence to death -- an inverse of normal proportionality review -- or that the death penalty should be imposed where the particular circumstances and character of the defendant may indicate that mercy is appropriate:

> Nothing in any of our cases suggests that the decision to afford an individual defendant mercy violates the Constitution. Furman held only that, in order to minimize the risk that the death penalty would be imposed on a capriciously selected group of offenders, the decision to impose it had to be guided by standards so that the sentencing authority would focus on the particularized circumstances of the crime and the defendant.

Id. supra, at 199.

Proffitt certainly cannot be read to require imposition of death in pursuit of consistency. The Proffitt plurality noted that the constitutional standard of consistent sentencing results was satisfied by the Florida statute's provision directing the sentencing authority "to weigh eight aggravating factors against seven mitigating factors to determine whether the death penalty shall be imposed." Proffitt, 428 U.S. at 251.

The Court then cited with approval the Florida Supreme Court's statement that it would compare each death sentence with other cases to "determine whether or not the punishment is too great." Id. (quoting State v. Dixon,

283 So.2d 1, 10 (Fla. 1973) (emphasis added)). The courts below failed to appreciate that Florida's appellate review procedure was approved in Proffitt because it protected individual defendants against the risk of an improper death sentence -- not because it achieved an inflexible consistency in all cases, and certainly not because it would eliminate the "risk" of an erroneous grant of life. Significantly, the review procedure approved in Proffitt provides for automatic appellate review only where the sentence imposed is death. Fla. Stat. Ann. § 921.141(4), App. at 29a. There is no similar automatic review of life sentences, with the potential of "upgrading" aberrant ones to death -- even where the jury has differed from the judge on sentence, and recommended death. The same limited function of "consistency review" by Georgia appellate courts -- also designed to avoid disproportionate death sentences-- was approved in Gregg v. Georgia:

> In particular, the proportionality review substantially eliminates the possibility that a person will be sentenced to die by the action of an aberrant jury. If a time comes when juries generally do not impose the death sentence in a certain kind of murder case, the appellate review procedures assure that no defendant convicted under such circumstances will suffer a sentence of death.

428 U.S. at 206.

A proportionality review of death sentences alone has been approved because the unique nature of capital punishment creates a corresponding need to avoid its erroneous imposition. See Lockett v. Ohio, 438 U.S. 586, 604 (1978); Woodson v. North Carolina, 428 U.S. 280, 305 (1976). There is no corresponding constitutional need for reliability about a sentence of life imprisonment, such as the one petitioner's jury recommended. The "reverse

proportionality" review applied by the lower courts to a jury recommendation of life literally stands the Constitution on its head.

3. The lower courts' "consistency" doctrine in this case necessarily affected, and abridged, petitioner's distinct Eighth Amendment right to have the sentencing authority give full consideration to his individual character and record. It increased "the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty." Lockett v. Ohio, 438 U.S. 586, 605 (1978)(plurality opinion of the Chief Justice). The trial court treated petitioner not as an individual, but simply as part of a two-person crime for which two equalized sentences had to be imposed -- literally in one sentencing order.[11/]

The result was a "false consistency," one "produced by ignoring individual differences." Eddings v. Oklahoma, 102 S. Ct. 869, 875 (1982). It necessarily led to a lessened consideration of those aspects of petitioner's individual background and character that distinguished him from his co-defendant -- and which were relied on by the jury. App. at 21a. This is the precise risk condemned by this Court's statement in Lockett: "When the choice is between life and death, that risk is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments." Lockett, 438 U.S. at 605.

11/ The blending of the two defendants' situations by the sentencing judge even included citation of evidence elicited only at the trial of petitioner's co-defendant in arriving at the sentence for both. Compare App. at 16a with 20a-21a. This raises serious questions under Gardner v. Florida, 430 U.S. 349 (1977).

4. The approach below was not an aberration. On the contrary, it is the inevitable consequence of a course upon which the Supreme Court of Florida embarked when it decided Barclay v. State, 343 So.2d 1266 (Fla. 1977), cert. denied, 439 U.S. 892 (1978). In Barclay, as in this case, death was imposed on a defendant whose jury had recommended life, and whose co-defendant had received a death sentence following a recommendation of death by his advisory jury. The Florida Supreme Court found that the same facts regarding participation in the crime applied equally to Barclay and his co-defendant. It then reasoned that the need for consistency in those circumstances justified an override of the jury recommendation of life:

> When there is disagreement between the jury and judge after both have evaluated the same data, we have said that the jury's recommendation should generally prevail. In this case, however, there is present one factor which persuades us that the judge's sentence should be upheld. Two co-perpetrators who participated equally in the crime would have disparate sentences were the jury's recommendations accepted.

Barclay, 343 So.2d at 1271.[12/]

In two other cases decided since Barclay, the Florida Supreme Court has suggested that Furman requires courts to apply a "consistency" factor in addition to factors specified in the state's sentencing statute. In Johnson v. State, 393 So.2d 1069 (Fla. 1980), and Douglas v. State, 373 So.2d 895 (Fla. 1979), the Florida court upheld the procedure for overriding jury recommendations on the

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12/ The error was arguably not prejudicial in Barclay because none of the statutory mitigating factors were established in that case and, moreover, the individual differences between the defendants there were "nominal." Id. The same cannot be said of the present case. Yet, the Florida court relied on Barclay to support its conclusion that petitioner's sentence should be equalized to that of his co-defendant. App. at 3a.

grounds that such a procedure is constitutionally "necessary", in light of Furman, to acheive consistent results.

As these Florida decisions demonstrate, the concept of "consistency" as an additional factor to be applied by sentencing authorities is becoming deeply imbedded in Florida law. Since more death sentences have been imposed in Florida than anywhere else in the nation,[13/] this doctrine will have widespread effect. This Court should grant the petition for certiorari to correct this serious misapplication of the Court's decisions.

13/ N.A.A.C.P Legal Defense and Educational Fund, Inc., Death Row U.S.A. (August 20, 1982).

III. THE FLORIDA COURTS' EXCLUSION OF MITIGATING TESTIMONY, CONCERNING REHABILITATIVE CAPACITY, CONFLICTS WITH APPLICABLE DEATH PENALTY DECISIONS OF THIS COURT

During the penalty phase of petitioner's trial, the judge ruled that Dr. Sidney Merin, a clinical psychologist, "[was] not to discuss rehabilitative capacity" because the list of mitigating factors in Fla. Stat. Ann. § 921.141(6) (App. at 30a-31a) does not include a defendant's capacity for rehabilitation. (R. at 1545-46, 1567-68). At petitioner's sentencing proceeding and in the trial court's findings in support of sentence, the judge compounded his error by considering only those mitigating factors explicitly mentioned in section 921.141(6), App. at 12a-14a, 21a-22a. The Supreme Court of Florida in effect dismissed this mistake as harmless error, reasoning that "[t]he effectiveness of [Dr. Merin's] testimony, even without the complained-of omission, is evidenced by the jury's recommendation of life imprisonment." Miller v. State, 415 So.2d 1262, 1263 (Fla. 1982).

It is true that the jury recommended life without Dr. Merin's testimony on rehabilitative capacity, but it was not a harmless error. The judge imposed death, and he did not hear, or consider, that evidence. Indeed, he excluded the evidence as a matter of law. (R. at 1545-46). By thereafter imposing and approving the death sentence, the Florida courts have emasculated this Court's injunction in Lockett v. Ohio, 438 U.S. 586 (1978):

> [T]he Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant

> proffers as a basis for a sentence less than death.

Id. at 604 (plurality opinion of the Chief Justice) (emphasis in original) (footnotes omitted).

Because the Ohio statute in Lockett permitted the sentencer to consider only specifically enumerated mitigating factors, it was held unconstitutional[14/] whereas the Florida statute was upheld in Profitt. In recent decisions, however, this Court has extended Lockett to individual sentencing proceedings as well as capital sentencing statutes. Eddings v. Oklahoma, 102 S. Ct. 869 (1982) (sentencer may not, as a matter of law, refuse to consider any relevant mitigating evidence); Green v. Georgia, 442 U.S. 95 (1979) (per curiam) (reliable, highly relevant hearsay testimony may not be excluded from a penalty hearing).[15/]

Evidence of rehabilitative capacity would clearly have been relevant to mitigation of sentence. It was one of the types of mitigating evidence the trial judge failed to consider in Eddings. 102 S.Ct. at 872. The State of Florida itself previously conceded the relevance of such evidence in Gardner v. Florida, 430 U.S. 349, 360 (1977). There, the Court noted that rehabilitation becomes irrelevant once a defendant is actually sentenced to death,

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14/ See also Bell v. Ohio, 438 U.S. 637 (1978). The principles enunciated in Lockett derived from a series of earlier decisions that invalidated mandatory death penalty laws while upholding statutes providing for consideration of all relevant mitigating factors. Roberts (Harry) v. Louisiana, 431 U.S. 633 (1977) (per curiam); Roberts (Stanislaus) v. Louisiana, 428 U.S. 325 (1976); Jurek v. Texas, 428 U.S. 262 (1976); Proffitt v. Florida, 428 U.S. 242 (1976); Gregg v. Georgia, 428 U.S. 153 (1976).

15/ In addition, the four Justices who dissented from the broad felony-murder rule announced in Enmund v. Florida, 102 S. Ct. 3368 (1982), nevertheless concluded that the trial judge's fundamental misunderstanding of the defendant's role in a capital felony was so likely to have infected the sentencing decision as to require a new sentencing hearing. Id. at 3392-94 (O'Connor, J., joined by Burger, C.J., Powell & Rehnquist, JJ., dissenting).

since "the extinction of all possibility of rehabilitation is one of the aspects of the death sentence that makes it different in kind from any other sentence." Id. Conversely, rehabilitation is a fortiori relevant in determining what sentence to impose.

It is, therefore, of no constitutional moment that the jury suggested life imprisonment despite the exclusion of Dr. Merin's assessment of petitioner's rehabilitative capacity. Under Florida law, "the sentencer" is the judge. Fla. Stat. Ann. § 921.141(2)-(3), App. at 28a-29a. By forbidding Dr. Merin's testimony about petitioner's rehabilitative capacity, the trial judge refused to consider, as a matter of law, "[an] aspect of a defendant's character or record . . . that the defendant proffer[ed] as a basis for a sentence less than death." Lockett, 438 U.S. at 604. The fact that Florida's sentencing procedure was found constitutionally sufficient in Proffitt v. Florida, cannot affect the conclusion: The Constitution required the sentencer to listen to such evidence. See Eddings, 102 S. Ct. at 875-76 & n.10; Lockett, 438 U.S. at 604-05.[16/] In ruling that the trial judge need not do so, the Florida Supreme Court sanctioned a disturbing curtailment of this Court's past holdings, and called into question the continued vitality of Lockett and Eddings in the Florida courts. In order to assure that this fundamental safeguard is followed in Florida and other states whose death penalty statutes otherwise pass constitutional muster, the petition for certiorari should be granted.

16/ The error in this case is more egregious than that in Eddings. Here the court completely excluded evidence of rehabilitative capacity, whereas in Eddings the judge actually heard the testimony at issue. Hence, it is unnecessary to speculate whether the trial court simply gave insufficient weight to a mitigating factor. Cf. Eddings, 102 S.Ct. at 881-82 (Burger, C.J., dissenting).

IV. RECENT DEVELOPMENTS RENDER FLORIDA'S JURY OVERRIDE OF LIFE SENTENCES UNCONSTITUTIONAL -- AT LEAST WHERE A STATUTORY MITIGATING FACTOR IS ESTABLISHED

Petitioner was sentenced to die under a Florida procedure allowing trial courts to impose a death sentence despite a jury recommendation of life imprisonment. Fla. Stat. Ann. § 921.141(2)-(3), App. at 28a-29a. In Dobbert v. Florida, 432 U.S. 282 (1977), this Court indirectly expressed general approval of that procedure. In view of recent factual and doctrinal developments, however, the override procedure cannot survive constitutional scrutiny. Because Florida's override procedure affects the lives of numerous defendants in capital cases, this Court should now examine the procedure "against evolving standards of procedural fairness." Gardner v. Florida, 430 U.S. 349, 357 (1977).

1. State legislative enactments reflect a general consensus against judicial overrides of jury determinations of life. Only three states currently allow death sentences to be imposed after a jury has recommended a sentence of life imprisonment. Fla. Stat. Ann. § 921.141, App. at 28a-31a; Ind. Stat. Ann. § 35-50-2-9e; Ala. Acts 1981, No. 81-178, §§ 8-9. At no time in the past thirty years have more than three states allowed judges to override such jury recommendations. Cf. Andres v. United States, 333 U.S. 740, 767 (1948). There is also an emerging consensus that, where there is more than one participant in the sentencing process, the sentencers must agree unanimously in order to impose a death sentence. Of the twenty-nine states in which juries must determine that death is appropriate in order for

capital punishment to be imposed,[17] all but two clearly require that the jury determination of death be unanimous.[18]

These objective indicia of contemporary societal standards place the constitutionality of Florida's override procedure in substantial doubt. Indeed, the Court has repeatedly found that the Eighth Amendment is not satisfied when a capital sentencing procedure has been rejected by an overwhelming majority of the states. See Woodson v. North Carolina, 428 U.S. 280, 288-301 (1976); Coker v. Georgia, 433 U.S. 584, 592-97 (1977); Enmund v. Florida, 102 S. Ct. 3368, 3372-76 (1982).

At the same time, recent empirical evidence concerning the manner in which the override procedure is administered in Florida undermines the premise of this Court's holding in Dobbert v. Florida, 432 U.S. 282 (1977). In Dobbert, this Court rejected the ex post facto challenge of a petitioner who had received a death sentence despite a jury recommendation of life, and whose crime had been committed when Florida's death penalty statute made jury sentences final. Noting that a law violates the ex

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17/ Those states are Arkansas, California, Colorado, Connecticut, Delaware, Georgia, Illinois, Kentucky, Louisiana, Maryland, Massachusetts, Mississippi, Missouri, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, Ohio, Oklahoma, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, and Wyoming. See App. at 40-41a. In Ohio and Kentucky death may only be imposed if the jury unanimously recommends it, but the trial court may reduce the jury death recommendation. Ohio Rev. Code Ann. § 2929.03(D) Ky. Rev. Stats. § 532.025.

18/ One of the exceptions, Nevada, requires that a panel of judges impose sentence if the jury cannot agree, and the panel must be unanimous to impose death. Nev. Rev. Stat. § 175.554. The requirements of the other state, Connecticut, are unclear. Conn. Gen. Stat. Ann § 53a-46a (1982).

post facto clause only when it works a more onerous burden overall than did the previous law, the Court found that the Florida override procedure was overall more favorable to defendants than the previous law. Id. at 295. In reaching this conclusion, the Court reasoned that, on the one hand, jury recommendations of death under the current statute are not final, as they had been under prior law; on the other hand, jury recommendations of life can be overridden, under the present law, only when "the facts suggesting a sentence of death [are] so clear and convincing that virtually no reasonable person could differ." Id. at 295 (quoting Tedder v. State, 322 So.2d 908, 910 (1975)).

Recent empirical evidence shows that the standard in Tedder v. State has not been utilized by the Florida courts in the manner that this Court envisioned. A recent study tabulated the results in all 79 cases between 1972 and 1978, in 21 Florida counties, in which either the judge or the jury chose death. The study found that in six percent of the cases, the judges granted a life sentence despite a jury recommendation of death. But in 28 percent of the cases, the judge imposed death notwithstanding a jury recommendation of life. Thus, Florida judges overrode a jury recommendation of life imprisonment almost five times as often as they overrode a jury recommendation of death. Gillers, Deciding Who Dies, 129 U. Pa. L. Rev. 1, 67-68 n.318 (1980) (summarizing data reported in L. Foley, Florida After the Furman Decision: Discrimination in the Imposition of the Death Penalty (unpublished study)). These and other statistics[19/] sharply refute the assumption underlying both

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19/ Of 181 persons on death row in Florida as of August 20, 1982, 33 were under death sentences imposed despite a jury

(Continued)

the actual holding in Dobbert, and this Court's implied approbation of the override procedure in that case.

2. In this case, the Florida Supreme Court said that the standard in Tedder v. State had been met -- that "virtually no reasonable person could differ on the appropriateness of the death penalty." App. at 3a. Yet, several ostensibly reasonable people did in fact differ with the Florida Supreme Court majority -- the two dissenting justices on that court and anywhere from seven to twelve jurors. (Under the Florida procedure, the jury must only indicate that a majority of its members had supported the recommended sentence, without indicating the precise number of jurors in the majority.) This case vividly illustrates the statement in Spinkellink v. Wainwright, 578 F.2d 582, 605 (5th Cir. 1978):

> [R]easonable persons can differ over the fate of every criminal defendant in every death penalty case.

The Florida standard in Tedder v. State has proved inherently unadministrable. By its very nature, it assumes at least a difference of opinion between a properly instructed jury (representing a cross-section of the community) and reviewing judges (who may represent only one element of society) -- and a regular practice of overriding jury determinations of life has occurred. It has cast on the defendant, rather than the state, the risk of any

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(footnote 19 continued)

recommendation of life imprisonment. Of those 33, the sentences of 11 had been affirmed by the Supreme Court of Florida. The appeals of the remaining 22 were still pending. An additional 38 persons sentenced to die since 1972 following a jury recommendation of life imprisonment are, for a variety of reasons, no longer under a sentence of death. Unpublished study conducted by NAACP Legal Defense and Educational Fund, Inc. (October 1982).

difference between jurors and judges. Cf. Bullington v. Missouri, 451 U.S. 430, 446 (1981).

3. Petitioner's recommended life sentence issued from a jury that applied objective sentencing criteria determined by the state legislature. Two forces were thus combined -- jury determinations and legislative enactments -- which the Court has previously found to be the primary indices of community values that guide imposition of the death penalty.

With respect to juries, the Court in Witherspoon v. Illinois, 391 U.S. 510 (1968), declared that the capital sentencing jury's task is to "express the conscience of the community on the ultimate question of life or death." Id. at 519. This jury function is deemed essential to ensure that individual sentence determinations "reflect 'the evolving standards of decency that mark the progress of a maturing society.'" Id. at n.15 (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958) (plurality opinion)). This Court has, moreover, relied on jury sentencing patterns in holding that imposition of the death penalty in certain circumstances is unconstitutional because it would offend contemporary values. See, e.g., Coker v. Georgia, 433 U.S. 584, 596-76 (1977); Enmund v. Florida, 102 S. Ct. 3368, 3375-76 (1982). Enactments of state legislatures have been similarly viewed. Woodson v. North Carolina, 428 U.S. at 294-95 ("legislative measures adopted by the people's chosen representatives weigh heavily in ascertaining contemporary standards of decency.").

Where, as here, the jury's recommendation of life is supported by the presence of statutory mitigating circumstances, a defendant's right to be sentenced in accordance with that recommendation is particularly compelling.

Petitioner presented evidence at the sentencing hearing in support of several different statutory mitigating circumstances.[20] The jury's recommendation could have rested on any one or more of these factors. But it was uncontroverted that petitioner established at least one of the statutory mitigating circumstances (no prior arrests or convictions) -- and the sentencing judge so found.

By enacting into law certain mitigating circumstances, the legislature has represented a community consensus that the presence of any one of those circumstances may justify leniency. When a jury finds a statutory mitigating circumstance to exist, the views of the two critical repositories of community values identified by this Court -- the jury and the legislature -- have coincided in the judgment that leniency is justified. For this reason, a jury's power to render a life sentence is at its apex when it finds a statutory mitigating circumstance to exist -- as it did in this case.

Conversely, the reliability of a death sentence is most subject to question when there is disagreement among the principal participants in the sentencing process, the jury and the sentencing judge. When such a disagreement exists -- and where the only participants representing a cross-section of the community believe that the individual

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20/ Petitioner presented evidence that he was 23 years old (R. at 1573); that he had no prior criminal record (R. at 1573); that he had used drugs on the night of the crime. (R. at 1599, 1318); and that he is highly susceptible to the influence and domination of others (R. at 1590-91). This evidence was relevant to the statutory mitigating circumstances contained in Fla. Stat. Ann. § 921.141(6)(g) (age of defendant at time of crime); (a) (defendant had no significant criminal history); (b)(defendant committed crime under influence of extreme mental or emotional disturbance); and (e) defendant acted under extreme duress or under substantial domination of another person). App. at 30a-31a.

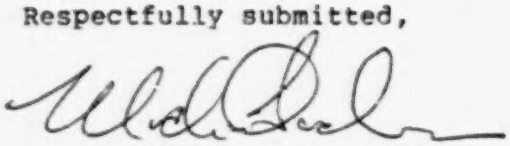
should be sentenced to life -- there is a substantial risk that the death penalty is not appropriate. Cf. Lockett, 438 U.S. at 605. A death sentence imposed in these circumstances fails to satisfy the Eighth Amendment "need for reliability in the determination that death is the appropriate punishment in a specific case." Woodson v. North Carolina, 428 U.S. at 305.

Florida has had an increasing number of death sentences and jury overrides, despite the rejection of the practice in most other states and the inherent reliability of a properly instructed jury applying the standards of the state legislature. In view of the inherent unreliability, and increasing use, of the the Florida override procedure to "upgrade" jury determinations of life to death, the petition for certiorari should be granted.

CONCLUSION

For the foregoing reasons, petitioner respectfully prays that a writ of certiorari issue to review the decision of the Supreme Court of Florida.

Respectfully submitted,



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